



INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

We make Indiana a cleaner, healthier place to live

Frank O'Bannon
Governor

Lori F. Kaplan
Commissioner

100 North Senate Avenue
P.O. Box 6015
Indianapolis, Indiana 46206-6015
(317) 232-8603
(800) 451-6027
www.state.in.us/idem

To: Interested Persons

From: Lori F. Kaplan
Commissioner *Lori F. Kaplan*

Date: April 11, 2001

Subject: IDEM Actions Related to SWANCC Supreme Court Decision

The recent SWANCC v. United States Supreme Court decision removes certain water bodies from the jurisdiction of the U.S. Army Corps of Engineers. Generally, 'isolated waterbodies or wetlands' that are not adjacent to navigable waters of the United States are considered affected by the SWANCC decision. Historically, Indiana has protected the state's waters, which include wetlands, by applying our water quality standards through our Section 401 Water Quality Certification program, in conjunction with the Section 404 U.S. Corps of Engineers permit program.

Although some of these waters may no longer be subject to federal jurisdiction, they are still waters of the state. IDEM will continue to protect all water bodies, including those affected by the SWANCC decision, through the state's water quality standards. The Supreme Court decision did not question the states' authority to enforce its own statutes and regulations, and in fact, reaffirmed the states' primary authority to regulate its water resources and to control water pollution.

Due to the confusion caused by the SWANCC decision and the start of the construction season, it is important that IDEM clarify its position and approach relative to water bodies affected by the SWANCC decision. Accordingly, IDEM:

- 1) Will publish in a subsequent Indiana Register a statement related to its interpretation of state law as applied to water bodies affected by the SWANCC decision. Actions that may violate the state's water quality standards are prohibited for these affected water bodies. This statement is included as Attachment 1 and reflects IDEM's past and continued interpretation that Indiana's water quality standards apply to wetlands.
- 2) Recommends that individuals or entities that are involved in projects for water bodies covered by the SWANCC decision submit project plans and designs for IDEM review. IDEM will review these projects in a manner consistent with the Section 401 Water Quality Certification program and issue a letter with recommendations as to the types of actions needed to avoid future enforcement for violation of water quality standards. The application form is included as Attachment 2.

- 3) Pursue enforcement for violations of surface water quality standards as appropriate.
- 4) Begin discussions with interested persons to modify the current draft of the 401 Water Quality Certification procedures rule to establish a state permit system for water bodies affected by the SWANCC decision.
- 5) Draft an example NPDES permit for wetland fills. IDEM believes the existing NPDES permit rules apply to projects affected by the SWANCC decision. We are currently preparing a draft model NPDES permit for wetland fills and will share and discuss that with interested persons before proceeding with that approach. NPDES permits, issued as a stop-gap measure prior to the effective date of new rules authorizing a state wetland permit program, appear to provide the best mechanism by which impacts to wetlands can be legally authorized. Additionally, they will provide a public process and a level of certainty for the public and the regulated community.

IDEM will soon schedule a session with a group of interested persons to discuss the rulemaking as affected by the SWANCC decision.

If there are any questions regarding specific projects, please contact Dennis Clark at 317/233-2482.